

I. BACKGROUND

On January 4, 2005, a Deed of Trust was recorded in Clark County securing a \$600,000.00

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1 Note on the instant property, with Cindy Birkland listed as “Borrower,” and Defendant CTC Real
2 Estate Services as “Trustee.” (“Deed of Trust”, Ex. B to Defs.’ Mot. to Dismiss, ECF No. 6-3.)

3 On October 31, 2005, two Quitclaim deeds were filed in Clark County. (“Quitclaim Deed”
4 1 & 2, Exs. H & I to Defs.’ Mot. to Dismiss, ECF Nos. 6-9, 6-10.) The first Quitclaim Deed
5 conveys the instant property from Cindy Birkland to the CoMiller Revocable Trust, and the
6 second conveys the instant property from Cindy Birkland and Jeffery T. Brown, “acting as
7 Trustees and on behalf of the CoMiller Revocable Trust,” to CoMiller, L.L.C. (*Id.*)

8 On October 25, 2010, Defendant MERS executed a Corporation Assignment of Deed of
9 Trust, assigning and transferring the beneficial interest in Plaintiff’s Deed of Trust from
10 Defendant CTC Real Estate Services, as Trustee, to U.S. Bank National Association, as Trustee,
11 for the benefit of Harborview 2005-1 Trust Fund. (“Assignment” Ex. D to Defs.’ Mot. to
12 Dismiss.) Also on October 25, 2010, U.S. Bank National Association, as Trustee, executed a
13 Substitution of Trustee, naming ReconTrust Company, N.A., as Trustee. (“Substitution of
14 Trustee” Ex. C to Defs.’ Mot. to Dismiss.) On October 25, 2010, Defendant ReconTrust recorded
15 a Notice of Default stating that Plaintiff was in breach of her obligations under the Note as of
16 September 1, 2008. (“Notice of Default” Ex. E to Defs.’ Mot. to Dismiss.)

17 Plaintiff does not allege that she is current in her payments on the Note. A Certificate of
18 the State of Nevada’s Foreclosure Mediation Program relating to the instant property, dated
19 January 3, 2011, was recorded in Clark County on February 22, 2011, stating that:

20 No request for mediation was made or the Grantor has waived mediation. As a
21 result no mediation is required in this matter. The Beneficiary may proceed with the
22 foreclosure process.

23 (“Certificate” Ex. G to Defs.’ Mot. to Dismiss.) Also on February 22, 2011, Defendant
24 ReconTrust recorded a Notice of Trustee’s Sale to take place on March 9, 2011. (“Notice of
25 Trustee’s Sale” Ex. F to Defs.’ Mot. to Dismiss) Though it is not clear from the pleadings, the

1 parties appear to acknowledge that no foreclosure sale has yet occurred.

2 Plaintiff filed her Complaint before this Court on April 5, 2011. (ECF No. 1.) The Court
3 notes that Plaintiff has previously appeared before the District of Nevada on similar claims for a
4 separate property, asserting causes of action for (1) quiet title; (2) lack of standing of trustee;
5 (3) breach of contract; (4) fraud; and (5) lack of standing for foreclosure. *Birkland v. Silver State*
6 *Financial Services, Inc., et al.*, Case No. 2:10-CV-00035-KJD-LRL (D. Nev. 2011) (granting
7 defendants' motion to dismiss, without leave to amend, and entering judgment in favor of
8 defendants on September 2, 2010).

9 **II. LEGAL STANDARD**

10 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
11 that fails to state a claim upon which relief can be granted. *See North Star Int'l. v. Arizona Corp.*
12 *Comm'n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule
13 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not
14 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See*
15 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
16 sufficient to state a claim, the Court will take all material allegations as true and construe them in
17 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.
18 1986).

19 The Court, however, is not required to accept as true allegations that are merely
20 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
21 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
22 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation
23 is *plausible*, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*,
24 550 U.S. at 555) (emphasis added).

25 A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b) for

1 failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino Police*
2 *Dept.*, 530 F.3d 1124, 1129 (9th Cir.2008). Rule 8(a)(2) requires that a plaintiff's complaint
3 contain "a short and plain statement of the claim showing that the pleader is entitled to relief."
4 Fed. R. Civ. P. 8(a)(2). "Prolix, confusing complaints" should be dismissed because "they impose
5 unfair burdens on litigants and judges." *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir.1996).
6 Mindful of the fact that the Supreme Court has "instructed the federal courts to liberally construe
7 the 'inartful pleading' of pro se litigants," *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987),
8 the Court will view Plaintiff's pleadings with the appropriate degree of leniency.

9 "Generally, a district court may not consider any material beyond the pleadings in ruling on
10 a Rule 12(b)(6) motion However, material which is properly submitted as part of the
11 complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner &*
12 *Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, "documents whose
13 contents are alleged in a complaint and whose authenticity no party questions, but which are not
14 physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to
15 dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch*
16 *v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule of Evidence 201, a court may
17 take judicial notice of "matters of public record." *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279,
18 1282 (9th Cir. 1986). Otherwise, if the district court considers materials outside of the pleadings,
19 the motion to dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara*
20 *Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

21 If the court grants a motion to dismiss, it must then decide whether to grant leave to amend.
22 The court should "freely give" leave to amend when there is no "undue delay, bad faith[,] dilatory
23 motive on the part of the movant . . . undue prejudice to the opposing party by virtue of . . . the
24 amendment, [or] futility of the amendment" Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S.
25 178, 182 (1962). Generally, leave to amend is only denied when it is clear that the deficiencies of

1 the complaint cannot be cured by amendment. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d
2 655, 658 (9th Cir. 1992).

3 **III. DISCUSSION**

4 **A. Quiet Title**

5 Plaintiff's first cause of action is styled as an action to "quiet title" and states that "Plaintiff
6 is the only party to this matter that can prove legal and equitable ownership interest in the
7 property." (Complaint, 7:¶37.) As a basis for this claim, Plaintiff alleges that as a result of
8 securitization, "the deed of trust is split from the note and is unenforceable, and any lien should be
9 struck from the land records." (*Id.* at ¶¶38-39.) Plaintiff's request under this cause of action is as
10 follows:

11 Plaintiffs therefore seek a declaration that the title to the subject property is vested
12 in plaintiffs alone, free of deed of trust liens, and that the defendants herein, jointly
13 and severally be declared to have no estate, right, title or interest in the subject
14 property and that said defendants be forever enjoined from asserting any estate,
15 right, title or interest in the subject property adverse to plaintiffs herein.

16 (*Id.* at 40.)

17 In Nevada, "[a]n action may be brought by any person against another who claims an estate
18 or interest in real property, adverse to the person bringing the action, for the purpose of
19 determining such adverse claim." NRS 40.010. The burden of proof in a quiet title action rests
20 with the plaintiff to prove good title in himself. *Breliant v. Preferred Equities Corp.*, 918 P.2d
21 314, 318 (Nev. 1996). When an adverse claim exists, the party seeking to have another party's
22 right to property extinguished, must overcome the "presumption in favor of the record
23 titleholder." *Id.* (citing *Biasi v. Leavitt*, 692 P.2d 1301, 1304 (Nev. 1985)).

24 Defendants submit two Quitclaim Deeds recorded in Clark County that show a transfer of
25 the instant property to CoMiller, L.L.C in 2005. Plaintiff does not mention CoMiller L.L.C. in her

1 Complaint or her Response, nor does she name CoMiller L.L.C. as a party. In her Response,
2 Plaintiff does not address the Quitclaim Deeds or the standing issue raised by Defendants in the
3 Motion to Dismiss. Accordingly, and because Plaintiff does not allege that she is current in her
4 mortgage payments, the Court finds that Plaintiff has failed to sufficiently allege good title in
5 herself.

6 **B. Wrongful Foreclosure**

7 In her fourth cause of action, styled as “Real Party in Interest Only Has Standing to
8 Foreclose,” Plaintiff alleges that “Defendants Countrywide Home Loans, Inc., Recontrust
9 Company, and MERS are not the real party in interest and lacks standing to foreclose on
10 Plaintiff,” and that “[i]n order to have standing [to foreclose] the real party in interest must be able
11 to provide proof that they are the holder and owner of the mortgage and note to foreclose.”
12 (Complaint, 10:¶¶66-67.)

13 Because foreclosures in Nevada are non-judicial, parties initiating foreclosure proceedings
14 are not required to prove standing to foreclose in a court of law before initiating the foreclosure
15 process. To the extent that Plaintiff is alleging a statutory defect in foreclosure pursuant to Ch.
16 107 of Nevada Revised Statutes, Plaintiff fails to sufficiently allege a defect in foreclosure.

17 Nevada statutes do not require parties initiating foreclosure to first provide proof that they
18 are the holder and owner of the mortgage and note. Securitization does not bar a party from
19 initiating foreclosure proceedings. *See* NRS 107.080; *Chavez v. California Reconveyance Co.*,
20 2010 WL 2545006, at *2 (D. Nev. 2010) (“NRS 107.080 does not forbid the securitization of a
21 loan.”). Furthermore, Defendants submitted the Certificate of Foreclosure Mediation issued by
22 the State of Nevada which verifies that no mediation is required.

23 Plaintiff also alleges that “Defendants failed to register the trust with the State of Nevada.”
24 (*Id.* at ¶70.) However, it is not clear from the Complaint what trust Plaintiff is referring to, nor is
25 it clear which legal requirement Plaintiff is alleging Defendants breached by failing to register.

1 Therefore, Plaintiff fails to sufficiently state a claim in her fourth cause of action.

2 **C. Breach of Contract and Fraud**

3 In her second and third causes of action, Plaintiff appears to claim breach of contract and
4 fraud relating to the securitization of her mortgage.

5 A claim for breach of contract must allege (1) the existence of a valid contract; (2) that
6 plaintiff performed or was excused from performance; (3) that the defendant breached the terms
7 of the contract; and (4) that the plaintiff was damaged as a result of the breach. *See* Restatement
8 (Second) of Contracts § 203 (2007); *Calloway v. City of Reno*, 993 P.2d 1259, 1263 (Nev. 2000)
9 (“A breach of contract may be said to be a material failure of performance of a duty arising under
10 or imposed by agreement”).

11 Plaintiff does not specify what contract Defendants violated, only stating that “[o]n or
12 about plaintiff and defendant entered into agreement for the purchase of Plaintiffs home at 1724
13 Sand Storm Drive, Henderson NV 89074.” (Complaint, 8:¶42.) Plaintiff also does not allege that
14 she performed or was excused from performance.

15 A claim of fraud requires specific allegations detailing the circumstances constituting the
16 fraud. Fed. R. Civ. P. 9. In her fraud claim, Plaintiff does not state specific persons, dates or
17 details describing the alleged misrepresentations by Defendants.

18 Also, as discussed above, securitization is not a bar to the initiation of foreclosure
19 proceedings. Plaintiff fails to base these causes of action on any other grounds. For these
20 reasons, Plaintiff fails to sufficiently state a claim upon which relief can be granted.


21 **IV. CONCLUSION**

22 **IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss (ECF No. 6) is
23 **GRANTED, without prejudice.**

24 **IT IS FURTHER ORDERED** that if Plaintiff chooses to file an Amended Complaint
25 consistent with this Order, correcting the deficiencies in her Complaint as described above, she

1 must do so **by February 3, 2012**, or the case will be closed.

2 **DATED** this 11th day of January, 2012.

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6 Gloria M. Navarro
7 United States District Judge
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